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No. 74-635

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

ROSE WONG

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR SUMMARY DISPOSITION

ROBERT H. BORK,
Solicitor General,
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Washington, D.C. 20530.

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The Solicitor General, on behalf of the United States, respectfully moves that this case, now pending in this Court on grant of the government's petition for a writ of certiorari,[1] be summarily reversed and remanded to the court of appeals for reconsideration in light of *United States* v. *Mandujano*, No. 74-754, decided May 19, 1976.

STATEMENT

A detailed statement of the pertinent facts is set forth in our petition for a writ of certiorari (pp. 2-5). Briefly, respondent testified in September 1973 before a grand jury in the Northern District of California investigating violations of 18 U.S.C. 1955 (illegal gambling businesses) and 18 U.S.C. 1511 (obstruction of state and local law

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[1]No. 74-635, certiorari granted June 1, 1976.

enforcement). Prior to testifying, the prosecutor warned respondent of her right to refuse to answer incriminating questions and told her that she could consult with an attorney before answering any questions. In addition, the prosecutor carefully explained to her the meaning of perjury and the penalties to which she might be subjected if she perjured herself.

The prosecutor then asked respondent if she had ever given money or gifts to any police officers and if she had ever met with police officers to discuss gambling. She denied that she had engaged in any such activities. At the time she was asked these questions, the government had evidence that she had paid bribes to certain police officers, who had turned the money over to the Federal Bureau of Investigation. The questioning was designed to elicit names of any officers who had not cooperated with the government, and who therefore would be indictable (Tr. 97).

Respondent subsequently was indicted for perjury, in violation of 18 U.S.C. 1623, on the basis of her denials to the grand jury that she had ever given money or gifts to any police officers or discussed gambling with them. Respondent moved to dismiss the indictment, alleging, *inter alia*, that the indictment was invalid because the testimony on which it was based was obtained without her having been effectively advised of her Fifth Amendment rights. The district court granted the motion on the ground that, although respondent had been given "a full, complete and adequate warning" of her privilege against self-incrimination prior to testifying, her grand

jury testimony must be suppressed because her lack of proficiency in the English language prevented her from understanding the warning.[2]

The court of appeals affirmed. Relying in large part upon the opinions of the Court of Appeals for the Fifth Circuit in *United States* v. *Mandujano*, 496 F. 2d 1050, and its companion case, *United States* v. *Rangel*, 496 F. 2d 1059, which it termed "the only precedents directly in point" (Pet. App. 4a, n. 3), the court of appeals here reasoned that "[t]he perjurious answers were induced by an unfair procedure violative of the [Due Process Clause of the Fifth Amendment]" (Pet. App. 2a). The unfairness stemmed, according to the court, from the fact that respondent was a "target" of the grand jury's investigation and had been asked questions about her involvement in the matter under investigation which were "tailored by [the prosecutor's] previously obtained knowledge of [that] involvement, true answers to which would have been incriminating," and which therefore placed respondent "in the position of either perjuring or incriminating herself" (Pet. App. 2a). Such unfairness was not remedied by the explanation of Fifth Amendment rights administered by the prosecutor, according to the court, since respondent had not understood the explanation (Pet. App. 5a, n. 4).

DISCUSSION

Both in terms of its facts and of the analysis of the legal issues by the court of appeals, this case parallels *United States* v. *Mandujano*, No. 74-754, decided May 19, 1976. While no opinion in *Mandujano* commanded a

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[2]The district court stated that respondent understood the questions to which she allegedly gave false answers (Tr. 98-99) and also understood what perjury meant (Tr. 110).

majority of this Court, we believe it is nevertheless clear from all three opinions that the decision in *Mandujano* is dispositive of the present case. Accordingly, we respectfully suggest that little useful purpose could be served by this Court undertaking plenary review and that it would be appropriate instead to remand the case to the court of appeals for further consideration in light of *Mandujano*.

1. There are no material factual distinctions between the instant case and *Mandujano*. In both cases, the defendant was called to testify before a grand jury investigating criminal activity of a kind with which he or she was known to have some involvement. Mandujano was subpoenaed to testify before the grand jury precisely because of his known connection with heroin distribution activities (plurality slip op. 19); here, respondent likewise was called because of her known attempts at bribery of police officers and the belief that she would possess information about police corruption (Tr. 97). In both cases, the questions to which allegedly perjurious answers were given focused upon the witnesses' participation in unlawful activities about which the prosecutor already possessed specific information. Moreover, both cases involve perjury prosecutions, rather than prosecutions for the underlying activities about which the witnesses were questioned.

The only arguably relevant factual distinction that we can perceive between the two cases is the finding in the instant case that respondent, because of her imperfect comprehension of the English language, did not understand the explanation of her testimonial privilege that was given to her at the time of her appearance before the grand jury (and that was substantially the same as the explanation of rights supplied to Mandujano).

While there was no finding that Mandujano's understanding of English was similarly impaired, this difference does not supply a basis for reaching a different result in the instant case, for it is plain that the court of appeals in *Mandujano* believed that the allegedly inadequate warnings he had received were equivalent to receipt of no warnings, since it concluded that, as a result of the inadequacy of the warnings, exercise of the privilege against self-incrimination was effectively foreclosed and Mandujano was left with a "Hobson's choice" between self-incrimination and perjury (496 F. 2d at 1056-1057).

Since the conduct of the government prosecutors in connection with the grand jury proceedings was precisely the same in all material respects in the two cases, and since respondent and Mandujano were both charged with perjury, the failure (if any) to tender an adequate or effective explanation of rights to these two "putative defendant" witnesses affords no ground to avoid a perjury prosecution under the clear import of all three opinions in *Mandujano*.

2. There is no substantial difference in the analyses of the courts of appeals in the two cases that would justify separate consideration by this Court of the instant case. Essentially, the Ninth Circuit in this case adopted the reasoning and relied upon the precedent of the Fifth Circuit's decision in *Mandujano* and its companion case, *United States* v. *Rangel*, 496 F. 2d 1059. Both the Ninth Circuit and the Fifth Circuit rested their holdings upon the proposition that the Due Process Clause of the Fifth Amendment is offended when a "putative defendant" is called before the grand jury without comprehensive and effective warnings of rights (Pet. App. 2a; 496 F. 2d at 1058). If anything, the government's position is somewhat stronger in the instant case because of the court of appeals' explicit recognition that

there was no actual bad faith on the part of the government in the grand jury proceedings (Pet. App. 5a, n. 4). There is accordingly no reason to suppose that the court of appeals would not apply the result in *Mandujano* to the instant case, were this case summarily remanded.

3. Moreover, we submit that it is clear from the opinions in *Mandujano* that all eight Justices who participated in that decision would also reverse the court of appeals' decision in the instant case. While there was not a unanimity of opinion as to the scope of the government's obligations to warn grand jury witnesses, it seems plain that there was agreement upon the proposition—controlling in this case—that the impropriety of questioning, if any, affords no defense to a charge of perjury in cases such as this. Thus, Mr. Justice Brennan observed in his concurring opinion that he was satisfied (on a record essentially the same as that in the instant case) "that the respondent's false answers were not induced by governmental tactics or procedures so inherently unfair under all the circumstances as to constitute a prosecution for perjury a violation of the Due Process Clause of the Fifth Amendment" (slip op. 1). And Mr. Justice Stewart, also relying on the *Bryson-Knox-Glickstein* line of cases for the proposition that the impropriety of questioning is ordinarily no defense to a perjury charge, stated, in words fully applicable to this case, that he joined in reversal because "this is not a case where it could plausibly be argued that the perjury prosecution must be barred because of prosecutorial conduct amounting to a denial of due process" (slip op. 1).

4. There are, of course, important unresolved issues concerning the obligations of prosecutors with respect to grand jury witnesses who are suspected of having engaged in criminal activities of a kind that the grand jury is investigating. One such question, before this Court in

United States v. *Washington*, No. 74-1106, certiorari granted June 1, 1976, is whether a prospective defendant's grand jury testimony should be suppressed in a trial on an indictment charging the substantive offense about which he was questioned before the grand jury, when he was not warned that he was a "target" of the grand jury's inquiry. But where, as here, the charge is perjury, and no force or trickery was used to induce the defendant to testify before the grand jury, the result is clearly controlled by *Mandujano*.

In view of the foregoing, we respectfully suggest that it would not be a fruitful utilization of the Court's resources to undertake plenary consideration of the instant case, but that the case instead should be remanded to the court of appeals for reconsideration in light of *Mandujano*. Such summary disposition is particularly desirable in light of the fact that this case is still at a pretrial stage, having already been delayed more than two years by this interlocutory litigation; summary disposition, therefore, will enable the trial to proceed without further significant delay.

CONCLUSION

The judgment of the court of appeals should be summarily reversed and the case remanded to that court for further consideration in light of this Court's decision in *Mandujano*.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

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